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THE TOP TEN RECENT DEVELOPMENTS IN LABOR AND EMPLOYMENTN LAW

Supplementary Materials

November 6, 2002

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Top Ten Legal Requirements

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Participant's Note Pad

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Background Investigations: California's Legislature Sees the Light and Eliminates Some Significant Burdens on California's Employers

For years, an employer's obligations under the California's Investigative Consumer Reporting Agencies Act (ICRA), Civil Code section 1786 *et seq*., mirrored their obligations under the Federal Consumer Reporting Act (FCRA), 15 U.S.C. section 1681 *et seq*. Last year, based upon the stated goal of combating the growing crime of "identity theft," California's Legislature substantially revised the ICRA, greatly increasing the burden on California's employers. Once most employers recognized what had happened, it was too late. The law had already been passed and was in force, leaving many employers scrambling to comply with the law's new requirements. Now, based upon the significant outcry of employers in the state, and substantial lobbying efforts, the Legislature has agreed to "clarify" the ICRA in several significant regards. This bill has been signed by Governor Davis and is effective immediately.

The Amendments That Were Enacted Last Year

By enacting Assembly Bill 655 (AB 655) last year, the Legislature significantly expanded the ICRA. The amendments required an employer to notify applicants or current employees every time a background check was obtained, and set forth specific requirements regarding timing and what information must be provided. AB 655 also contained two dramatic changes to existing law: First, it specifically required that an employer provide a copy of the report to the consumer within seven days of receipt, whether requested or not. Second, the law extended its scope to cover background checks and investigations conducted in-house by an employer, without the use of a consumer reporting agency.

The Newly Enacted Amendments

1. Employers must obtain notice and consent every time an investigative consumer report is obtained.

First the bad news: While apparently seeking to ease the burden on employers, the Legislature has increased employers' burden in one significant respect. Whereas the FCRA has always required written consent prior to seeking a consumer report, the ICRA previously only required notice. Now the ICRA has expanded the notice requirement to include an explicit provision requiring written consent from the consumer every time a consumer report is sought. This differs significantly from the FCRA, which permits a single consent form to be signed covering all subsequent reports.

Specifically, the ICRA now requires that prior to requesting a report, an employer must provide a written disclosure to the consumer containing the following information:

- The fact that an investigative consumer report may be obtained.
- Identifying the permissible purpose for obtaining the report, i.e., for employment purposes such as hiring or promotion.
- Indicating that the report may include information on the consumer's character, general reputation, personal characteristics, and mode of living.

- Identifying the name, address, and telephone number of the investigative consumer reporting agency conducting the investigation.
- Notifying the consumer of the specific nature and scope of the investigation requested, and providing the consumer with a summary of his or her right to view the information compiled by the consumer reporting agency.
- Providing that the consumer must authorize in writing the procurement of the report *on the disclosure form*.

The authorization form must be separate from other documents, and cannot be contained in the application or handbook. Thus, employers must now have a single form that not only provides information to the consumer, but also requires the consumer to acknowledge, on that form, their consent to having the report made. A single consent form may, however, be used to comply with both the ICRA and FCRA.

2. Notice and consent is not required for investigations into misconduct or wrongdoing.
Last year's amendments created ambiguity regarding whether notice was required for investigations into suspected employee misconduct, such as theft or sexual harassment. One provision seemed to exempt all such investigations. Another provision appeared to exempt only investigations into suspected criminal activity (e.g., theft). By the new amendments, the first provision has been expanded to include any suspicion of misconduct or wrongdoing. The second provision, which created the ambiguity, was eliminated. Further, these provisions have been clarified by a new provision specifically indicating that the notice and consent requirements do not apply to investigations into misconduct or wrongdoing. Thus the law can now be read broadly to exempt any investigation by an outside entity into employee misconduct or wrongdoing from the notice and, more significantly, the consent requirements of the ICRA. C.C.§1786.16(a)(2). It should be noted that there is still some dispute regarding whether the notice and consent requirement under the FCRA applies to investigations into misconduct such as sexual harassment.

3. Employers are not required to provide employees suspected of misconduct with a copy of the investigation report.
One of the most serious consequences of last year's amendments emanated from the requirement that the applicant or employee receive a copy of any report prepared by a consumer reporting agency. Although there was a limited exception in the notice provision for misconduct investigations (see above), no such exception was included in the provision requiring the employer to provide a copy of the report to the accused person. Many employers feared that they would be unable to properly investigate claims of sexual harassment and other wrongdoing if the witnesses learned that the alleged wrongdoer would immediately receive a copy of the report. To remedy this unintended consequence, the Legislature amended the ICRA to state that no copy of the report is required "if a report is sought for employment purposes due to suspicion held by an employer of wrongdoing or misconduct by the subject of the investigation." CC §1786.16(c).

4. Consumers must affirmatively request a copy of the report, which can be sent directly by the consumer reporting agency.
Last year's amendments placed the burden on the employer to promptly provide the subject of the report with a copy. This burden has been somewhat reduced. Now the employer must provide

a "check box" which permits the consumer to indicate affirmatively that he or she wants to receive a copy of any report obtained by the employer. This check box can be included on the disclosure and consent form, or as a separate document. More importantly, the Legislature has clarified that this duty is delegable. It is advisable for an employer to agree with its consumer reporting agency that the consumer reporting agency will send a copy of the report directly to any consumer indicating a desire to receive the report at the same time that the report is sent to the employer. CC §1786.16(b).

5. An employer does not have to disclose in-house investigations or reference checks unless it obtains certain public records.

Among the most serious and controversial ramifications of last year's amendments was the provision that required all employers to disclose to applicants and employees the result of in-house investigations. As written, this would have included reference checks, as well as investigations into wrongdoing such as sexual harassment, discrimination or theft. This section has been almost completely rewritten.

Now the law states that an employer only has an obligation to disclose information obtained directly by the employer "that is a matter of public record." Public records are defined as "records documenting an arrest, indictment, conviction, civil judicial action, tax lien, or outstanding judgment." Where an employer receives such information, it must provide the consumer with a copy within seven days. Further, the consumer can waive their right to receive these reports by a "check box" on the job application or any other written form. However, even where the consumer has waived his or her right to receive this information, it must be provided if the employer takes adverse action based upon the information obtained from these public records. CC §1786.53.

In addition, a new section was specifically added indicating that the ICRA does not alter the ability of employers to exclude reference information from personnel files, as provided by California Labor Code §1198.5, and that the ICRA is not intended to force the disclosure of information protected by the attorney-client privilege and attorney work-product doctrine. CC §1786.55.

6. The provision requiring notice of adverse action is reinstated.

Last year's amendments deleted the provision of the ICRA requiring notice to a consumer where the employer decides to take adverse action based upon the contents of the report. The Legislature has reinstated this requirement, which is similar to a requirement that remains in the FCRA. Where an employer denies employment "either wholly or partly because of information contained in an investigative consumer report" the employer must notify the consumer of that fact along with the name and address of the consumer reporting agency. Under the FCRA, where adverse action is taken based upon the contents of a consumer report, a copy of the report must also be provided with this notice.

These Amendments Will Take Effect Immediately Upon Enactment

AB 1068 was signed into law on September 28, 2002. Recognizing the significant problems and potential liability that would face California's employers if the law were not changed, the Legislature has passed these amendments as a "clarification" of existing law and on an urgent basis. As a result, the amendments became effective immediately upon enactment. Further, because these changes are meant to be a "clarification" of existing law, they arguably eliminate

liability for failure to comply with last year's amendments to the extent that those obligations have been deleted by the current amendments. On the other hand, employers must immediately comply with the newly enacted notice and consent provisions of the ICRA.

Summary

- California employers must provide notice and obtain consent every time they hire a consumer reporting agency to conduct a background check, except for investigations into suspected misconduct or wrongdoing.
- On the consent form, employers must provide a means for the consumer to obtain a copy of the report, and should decide in advance who will provide the report to the consumer.
- Employers do not have to provide a copy of the report regarding investigations into suspected misconduct or wrongdoing.
- Employers must notify the consumer if adverse action is taken based upon the contents of the background check, and may have to provide a copy of the report.
- Employers must provide consumers with public records reports obtained directly by the employer, unless the consumer waives this right.
- Employers do not have to provide information regarding background checks, reference checks or investigations conducted in-house other than these enumerated public records.

More Time for Filing Employment Claims Permitted by the California Legislature

More than 150 years ago, a New York appellate court declared a written opinion that "No man's life or property is safe when the legislature is in session." While the applicability of that concept may depend upon whose interests are affected by the legislature, there is no doubt that the California Legislature upheld its reputation as an activist body in the annual session just concluded.

Among the bills approved by the Legislature and signed by Governor Gray Davis so far are two bills that extend the period of time within which persons may file lawsuits bringing certain employment-related claims. The first bill is SB (Senate Bill) 688 that doubles from one year to two years the time within which a plaintiff may bring a state court action for (1) assault, (2) battery, or (3) injury to, or for the death of, a person caused by the wrongful act or neglect of another.

While the bill's stated reason for extending these statutes of limitation was to give the families of the victims of the September 11, 2001, terrorist attacks more time to bring suit in state court, a number of employment-related claims—not at all a product of the horrific events of 9/11—are also affected by the new longer statute of limitations. Although acts of assault or battery are not commonly brought against employers, causes of action falling within the third category for which the statute of limitations has been doubled are more frequently alleged by plaintiffs in employment litigation. Claims falling within the catch-all category of "injury-caused-by-the-wrongful-act-of-another" include those for:

- wrongful termination in violation of public policy (*Barton v. New United Motor Mfg.* (1996) 43 Cal.App.4th 1200, 1209; *Romano v. Rockwell Int'l, Inc.* (1996) 14 Cal.4th 479, 501),

- intentional and/or infliction of emotional distress (*Murray v. Oceanside Unified School Dist.* (2000) 79 Cal.App.4th 1338, 1363),

- invasion of privacy (*Cain v. State Farm Mut. Auto. Ins. Co.* (1976) 62 Cal.App.3d 310, 313), and

- federal civil rights, claims such as 42 U.S.C sections 1981, 1983, 1985(3) and 1986, brought in either state or federal courts (see *McDougal v. County of Imperial* (9th Cir. 1991) 942 F.2d 668, 674-675 on "borrowing" California's one-year personal injury statute).

The expanded statute of limitation could arguably also apply to ERISA retaliation claims (§ 510) (*Felton v. Unisource Corp.*, 940 F.2d 503, 512 (9th Cir. 1991)).

For such potential claims, starting January 1, 2003, employers will not be able to "breathe easier" until two years, not one year, have passed from the date the potential claim arose (new Code of Civil Procedure section 335.1). The longer-lasting effect will be a likely increase in the number of these claims that are brought against employers, and thus an increased cost to California employers of defending and settling employment litigation.

The second bill enacted by the legislature and signed by the Governor is AB (Assembly Bill) 1146. This bill began its legislative life in February 2001 as a proposal relating to child care and

development services. The bill was morphed early this year into a proposal to toll (extend), under certain circumstances, the limitations period within which a civil action alleging a violation of the California Fair Employment and Housing Act (FEHA) can be filed. The current statute of limitations is one year from the issuance of a right-to-sue notice from the Department of Fair Employment and Housing (DFEH), the state administrative agency that enforces the FEHA. This new bill, not passed as an urgency statute, will take effect on January 1, 2003.

Under this revision to California Government Code section 12965, the one-year statute of limitations period within which the FEHA civil action must be filed, is tolled in two situations. The first is when all of the following conditions exist:

1. a timely administrative charge has been concurrently filed with the DFEH and the U.S. Equal Employment Opportunity Commission (EEOC);

2. the DFEH defers investigation of the charge to the EEOC; and

3. a right-to-sue notice is issued by the DFEH on deferral.

Under these circumstances, the time for commencing an action for which the statute of limitations is tolled expires either (A) when the federal right-to-sue period to commence a civil action expires (ninety (90) days after the EEOC concludes its investigation and issues its own right-to-sue notice), or (B) one year from the date of the DFEH's right-to-sue notice, whichever is later (new Gov't Code § 12965(d)).

The second situation which tolls the FEHA one-year statute of limitations is when:

1. a discrimination charge is timely filed concurrently with the DFEH and the EEOC;

2. the EEOC defers investigation of the charges to the DFEH;

3. after investigation and determination by the DFEH, the EEOC agrees to perform a "substantial weight review" of the DFEH's determination, or the EEOC conducts its own investigation of the claimant's claim.

Again, under these circumstances, the time for commencing an action for which the statute of limitations is tolled expires either (A) when the federal right-to-sue period to commence a civil action expires (again, ninety (90) after the EEOC issues its own right-to-sue notice), or (B) one year from the date of the DFEH's right-to-sue notice, whichever is later. (New Gov't Code § 12965(e).)

The intent of the bill was to codify the holding of the case of *Downs v. Department of Water & Power* (1997) 58 Cal.App.4th 1093, 1101-02. The *Downs* case is an example of a court recognizing the application of the principle of equitable tolling of the FEHA's one-year filing deadline until the EEOC completes administrative processing of the administrative complaint, and the accrual period commences on the complainant's federal claims. The bill's proponent maintained that the lengthy time associated with the EEOC's completion of its investigative activity was compelling complainants who wished to preserve the option of bringing suit in state court on their FEHA claims to file suit before the EEOC had completed its investigation, thereby causing "needless litigation."

According to the committee reports, the bill was supported by the DFEH, Governor Davis, Attorney General Bill Lockyer, and the American Federation of State, County and Municipal Employees, among others.

The practical effect of the new law for employers will be to provide a period of time longer than one year for an individual to file his or her DFEH court action if the EEOC's investigatory process, coupled with its own right-to-sue period, exceeds one year from the date the DFEH earlier issued its right-to-sue notice. Legal authority for application of such a longer period was provided by the *Downs* case, but only if it were raised by a plaintiff in each individual case, where appropriate. The placement of this legal principle in a statute means that this exception to the defense of the statute of limitation can be expected to be raised with greater frequency by plaintiffs.

Aggrieved individuals are not required to file administrative complaints either with the DFEH or the EEOC. However, if they do not, and thereafter file an action in court, the remedies to which they would be entitled are less than if they had exhausted their administrative remedies.

This enactment of AB 1146 is the latest of several recent legal developments that may provide individuals claiming employment discrimination greater time in which to file lawsuits asserting such claims. In July of this year, the US Ninth Circuit Court of Appeals in *Kang v. U. Lim America, Inc.*, 296 F.3d 810, held that the one-year period for bringing a California state law claim for wrongful termination in breach of public policy is tolled during the time that a DFEH administrative complaint is being processed, where the public policy at issue flows from the FEHA. While this Ninth Circuit ruling has not yet been adopted by the California courts, and is seemingly inconsistent with an earlier pronouncement by the California Supreme Court, it is binding on lower federal district courts in California.

Recommendations

These legislative developments remind employers to make sure their employee handbooks are up to date, especially those portions explaining to employees what sexual harassment and discrimination are, and requiring employees to report suspected incidents of harassment or discrimination as soon as they are detected. If not required to do so, employees may wait as long as 729 days before alerting an employer - by filing a state court suit -- to illegal discrimination or harassment. The problems for employers of then locating witnesses and other evidence may well be insurmountable.

A second recommendation is for employers, in light of these new laws, to revisit the benefits and burdens of implementing pre-dispute mandatory binding arbitration for prospective and current employees. Although federal law on mandatory binding arbitration of discrimination claims has recently become more favorable to employers by the case of *Equal Employment Opportunity Commission v. Luce, Forward, Hamilton, & Scripps*, __ F.3d __, 89 Fair Empl.Prac.Cas. (BNA) 1134, 2 Cal. Daily Op. Serv. 8033, 2002 Daily Journal D.A.R. 10,089 (September 3, 2002), the state law on this issue continues to evolve, and remains in flux.